In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and
CHRONICLE PUBLISHING CO.,
Petitioners,

VS.

OLIVIA NIEMI, a Minor, by and through her
Guardian ad Litem, Valeria Pope Niemi,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

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The Respondent, Olivia Niemi, a minor by and through her Guardian ad Litem respectfully prays that this Honorable Court deny a writ of certiorari.

QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments to the United States Constitution constitute a defense to an action based on negligence in the use of words and conduct proximately causing harm and violating a legal duty?

2. Assuming that the First and Fourteenth Amendments to the United States Constitution constitute a defense to an action of negligence should this be an absolute defense to deprive the plaintiff of the right to present her case before a jury?

STATEMENT OF THE CASE

That on September 10, 1974 NBC televised "Born Innocent" to a national audience.

In the early segment of the television showing a young girl is so graphically shown being raped by other young girls with a plumber's helper so as to cause hundreds of viewers to believe that actual penetration took place.

Congressional records will show that NBC was warned in a congressional hearing concerning the danger of violence as portrayed by television on young minds and promised that they would exercise their duty in showing restraint in the types of scenes portrayed.

That they employed the services of a censor for this very purpose.

That they had in their library books that had been written by psychiatrists and professional experts on the dangers of televising certain scenes that would graphically show violence and warning them of the danger that such scenes could cause to the minds of minors.

James E. Duffy, President of ABC television network confessed in a speech he gave on October 23, 1974 that audience ratings blind television networks to their basic responsibility and in serving themselves, they often do great dis-service to their viewers. Mr. Duffy then pointed out that programs such as "Born Innocent" should not have been shown at such an early hour when children more often than not control the dial.

That NBC network recognized that at the hours of 7:30 p.m. and 8:00 p.m. a large number of children watch television and termed said period of time: "the family hour".

In the case of *Writers Guild of America West v. Federal Communications Commission,* 423 F.Supp. 1064, Petitioner National Broadcasting Company, Inc. prayed to the United States District Court that a family hour shown from 7:00 p.m. to 9:00 p.m. during which time no sex or violence would be shown should be continued. The "Family Hour" was instituted because of the broadcast of "Born Innocent".

The trial judge in the case of *Writers Guild of America West v. Federal Communications Commission, supra,* made a finding that broadcasters were more interested in dollars than the public interest and used violence as a tool to hike program ratings if left free to program in their own discretion. The Court also found that the depiction of violence on television had been a continuing source of congressional and public concern for more than two decades. The Court further found that the United States Senate Appro-

priations Committee joined with the United States House of Representatives to urge the proper agency to exercise its power in the area of television program violence particularly as to its effect on children. The Court further recognized in the opinion that there had been public outcry surrounding scenes of violence particularly the televising of the movie, "Born Innocent".

That Petitioners, National Broadcasting Company, Inc. and Chronicle Publishing Company operating a local station in San Francisco broadcast said picture "Born Innocent" at 7:30 p.m. in all of the midwestern states and in the western states at 8:00 p.m. on September 10, 1974.

That before said program was aired, fifteen proposed commercial sponsors after seeing the preview of the show refused to permit their advertising to be used in connection with said production.

That the Petitioners deliberately used national advertising to induce a youthful audience to watch the program.

That on September 9, 1974 at the same hour that "Born Innocent" was televised Petitioners televised another show called "Born Free" which would be particularly suited for children viewers and concerned itself mainly with the lives of lion cubs.

That the advertisement of "Born Free" and "Born Innocent" had the same makeup and occupied the same place in the two pages of TV Guide and would cause children and their parents to believe that they

were again seeing "Born Free" on the following night if they looked at the advertisement quickly.

That the advertisement concerning "Born Innocent" featured the age of the star of said production namely, Linda Blair who had starred in the movie, "The Exorcist". This advertisement featured the fact that Linda Blair was fifteen years of age. This again was to attract a youthful audience.

That proof that Petitioners believed that said advertisement would attract a youthful audience was shown by their endeavors to unsuccessfully attempt to secure the Walt Disney Productions, Inc. to be one of the sponsors of the program "Born Innocent".

That the crime of inserting an object in the vagina of a female juvenile by other female juveniles is practically unheard of and is a rarity.

That four days after the televising of "Born Innocent" young girls who had seen said rape scene decided to imitate said unusual act and attacked the eight-year old Respondent by inserting a beer bottle in her vagina.

That it was discovered that for over one year after "Born Innocent" was televised girls who had been sent to a juvenile home in Tacoma, Washington were subjected by inmates who had likewise seen the show to an initiation called "Born Innocent Initiation" where physical objects were also inserted in their vaginas.

PROCEEDINGS BELOW

The theory of liability set forth in Respondent's complaint was not based on censorship or obscenity nor does it call for any actions of restraint or prohibition or injunctive relief. It sets forth actions of willfulness and negligence and alleges a legal duty and proximate cause and injury and then prays for damages as the prayer in any negligence action would do. The pleading is limited to the facts of the instant case and does not attempt to place a restraint on the television industry. It merely asks damages under the facts of the instant case should legal liability be shown as a matter of law and proximate cause, negligence and damages be proven to the satisfaction of the trier of fact by a preponderance of the evidence.

Petitioners moved for summary judgment in the Superior Court and did annex the film of "Born Innocent" to the moving papers [R.T. 13]. There is nothing in the record which discloses that the trial judge who denied the motion for summary judgment did not view the film. Even if he did not view the film, under the circumstances it would be immaterial inasmuch as he in effect held that there were questions of fact to be decided. It would have been useless for the trial court to view the film without the aid of an expert to interpret it. It would have been the same if he had examined an x-ray without the aid of the testimony of doctors.

Petitioners then filed a Writ of Mandamus before the Intermediate Appellate Court of the State of California on August 31, 1976. It is not true that said

Court did not affirm the denial of the summary judgment motion. The Court of Appeal denied the Writ of Mandamus for a summary judgment. The Court of Appeal stated in the opinion that they did not determine the merits of the case as there was no need for them to do so.

Petitioners then failed to file a Petition for Hearing before the Supreme Court of the State of California and thus the denial of their motion for summary judgment became final and it was imperative that the trial judge impanel a jury and allow the trial to proceed.

The trial court could not have heard a renewed motion for summary judgment under the California statute inasmuch as there were no new facts and consideration of the question had already been decided against them by the California Appellate Court which opinion had become final and which mandated the trial judge to proceed with the jury trial. [Refer to R.T. p. 3, line 17 through p. 4, line 11; R.T. p. 5, lines 1-14; R.T. p. 11, lines 9-12; R.T. p. 12, lines 26-28; p. 13, lines 1-4; R.T. p. 19, lines 17-27; R.T. p. 20, lines 14-28; R.T. p. 21, line 1; R.T. p. 32, lines 2-7; R.T. p. 32, lines 23-24; R.T. p. 34, lines 2-20; R.T. p. 60, line 12; R.T. p. 86, lines 16-20].

The Court of Appeal correctly stated in its opinion that the trial judge acted in excess of his jurisdiction [Witkin, *California Procedure* (2d Ed. 1971) Trial §73 p. 2908]. (See p. 6a of Appendix A to Petition for Writ).

The trial judge made a Finding of Fact and Conclusions of Law which he was not permitted to do in a jury trial.

THE STAY APPLICATIONS

Petitioners have applied to the Court of Appeal and to the Supreme Court of the State of California and to this Honorable Court for a stay of the trial and each of said Courts have denied said stay.

THERE IS NO REASON FOR GRANTING THE WRIT

It is not true that Respondent has sued Petitioners upon a tort of "initiation".

Respondent has sued on many acts of willfulness and negligence which have been outlined above and which constitute a breach of their legal duty to the public in using the public airwaves. These acts of willfulness and negligence which constitute the tort were caused by imitation by children who are not parties to this action.

It is not true as Petitioners contend that Respondent claims that those who create and exhibit dramatic works are liable for injury if they cause imitation of any aspect of the expression.

Petitioners have contended before all of the previous courts and in their petition to this Honorable Court that if Respondent is successful, no drama can be shown that involves a crime and no criminal event can be given to the public on the news.

We repeat that this case based upon tort should be decided upon its own particular facts.

The same type of argument was advanced by the media when they first opposed the tort of "invasion of privacy".

In the case of *Gill v. Curtis Publishing Company,* 38 C.2d 277 at page 278 the California Supreme Court states that the dissemination of news and information consistent with the democratic processes under the Constitution guarantees of freedom of speech and of the press must be balanced against the public interest in the consideration of the First Amendment of the United States Constitution. The Court then states:

> "It has been objected that a recognition of the right of privacy would open up a vast field of litigation, some of it bordering on the absurd. But courts recognizing the right deny the validity of this objection. According to the latter view, the fact that a recognition of the right would involve many cases near the border line, and would present perplexing questions, is not a good ground for denying the existence of such right or refusing to give relief in a case where it is clearly shown that a legal wrong has been done."

The trial of this case would depend upon particular facts of this case and will in no way freeze the creative arts.

ARGUMENT

I.

THERE IS NO DEFENSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION TO A NEGLIGENCE ACTION.

The California Court of Appeal in its opinion states as follows:

> "appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, 'Born Innocent,' resulted in actionable injuries." (Cf. *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40.)

The Superior Court of California in *Weirum v. RKO General, Inc.*, 15 C.3d 40, held that there is no defense to the First Amendment of the United States Constitution in a negligence action.

Petitioners attempt to distinguish *Weirum v. RKO, supra,* upon the ground that the California Supreme Court decided the case under the incitement exception to the First Amendment.

It is their contention that in that case the radio station actually urged motorists to speed and drive carelessly through crowded streets and specifically urged motorists to be heedless of the lives and limbs of other occupants of motor cars who may be in the near vicinity.

Having reached this conclusion, they then claim that the Supreme Court of California recognized that such facts brought the *Weirum* case directly within

the incitement exception of the First Amendment and, therefore, *Weirum* cannot be cited to support the law that the First Amendment is not a defense when words cause physical injuries.

Where in the *Weirum* opinion does it appear that the broadcaster told the motorists at what speed to drive their cars?

The first part of the decision is devoted to the determination of whether there was a duty owed by the broadcasters to an innocent member of the public by the negligent utterance of words.

The California Supreme Court in discussing the question of duty was only considering whether there was legal duty and not whether there was an exception of incitement to the First Amendment in the case.

While an attempt is being made to distinguish the act of negligence in the method of broadcasting in the *Weirum* case from the alleged acts of negligence in the instant case the distinction would be only one of foreseeability which as stated by the said Supreme Court is a question of fact for the jury. Furthermore foreseeability is conceded by Respondents.

If as a matter of law there was no legal duty by the broadcaster and a member of the public was killed because of the independent act of someone who heard the broadcast, then the plaintiff could never have won in the *Weirum* case.

The *Weirum* case was not decided on the exception of incitement to the defense of the First Amendment.

Thus, the Supreme Court of California has established in the *Weirum* case that there is a legal duty owed by one who uses the airwaves to carry words or pictures not to injure another.

Once that duty has been established, then the question of proximate cause and foreseeability, which are questions of fact, must then be determined.

At page 47 the Supreme Court states:

> *"Reckless conduct* by youthful contestants *stimulated* by defendant's broadcast constituted the hazard to which decedent was exposed."

The reckless conduct was a question of fact.

Whether the reckless conduct in this case was stimulated by the defendants' broadcast was likewise a question of fact.

The trial judge in this case made a Finding Of Fact. That Finding Of Fact was that the picture "Born Innocent", televised by Petitioners, did not stimulate the wrongful acts of the girls who artificially raped the appellant.

The issue of fact should never have been decided by the judge, and particularly before any testimony, including experts' testimony, was even permitted to be introduced in evidence.

Again at page 47, the Supreme Court states:

> "Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable--i.e., *if the gravity and likelihood of the danger outweighed the utility of the conduct involved.* (See Prosser, *Law of Torts,* 4 Ed. 1971, pp. 146-149)"

It is interesting to note that the California Medical Association has involved itself in this case and filed a brief amicus curiae. This brief advises the Court that the doctors of this State believe that this type of broadcast, under the circumstances of this case, caused children to perform the wrongful act and the doctors further believe that such conduct does stimulate violence by minors.

Conceding this to be true for the purpose of argument, this certainly involves serious danger of a very grave nature. This charge made by the doctors of this State is based on expert opinion. Regardless of this warning of grave danger by the Medical Association of this State can it be said there is no duty?

Now let us look at the utility of the conduct involved.

Does not the prevention of injury or death to a person greatly outweigh the conduct that is involved in this case, which is to permit a large audience of youths to view at an early evening hour the simulated rape by a plumber's helper into the vagina of a 15-year-old child actress?

As so well stated by Your Honorable Court in the case of *Young v. American Mini Theaters,* 49 L.Ed. 2d 310, decided in June, 1976, at page 325:

> "Few of us would march our sons and daughters off to war to preserve the citizens' right to see specified sexual activities exhibited in the theaters of our choice."

To paraphrase this language of Your Honorable Court, few of our parents would be willing to see

their boys march off to war to enforce the right for children at either 7:00 p.m. or 8:00 p.m. at night during the family hour to be able to see an act of perversion simulated upon the body of a 15-year-old girl.

In *President's Council District 25 v. Community School Board No. 25,* 457 F.2d 289, the Court held that public libraries did not violate the First Amendment by refusing to make all books which they considered had pornographic material available to minors.

The Supreme Court of California stated that they were not persuaded that the imposition of a duty in the *Weirum* case would lead to unwarranted extensions of liability.

The finding of duty in this case will likewise not lead to the censorship of all plays and books and newspapers as the briefs on the opposing side would have the Court believe.

As in the *Weirum* case, the damages sought here can only be obtained if it is proven that the Respondents committed a negligent or reckless act and that harm was foreseeable and that harm was proximately caused.

The Supreme Court of California has stated in the case of *Tarasoff v. Regents of the University of California,* 17 C.3d 425, that the most important of the considerations in establishing duty is foreseeability and cites with approval the case of *Weirum v. RKO General, Inc., supra,* and *Dillon v. Legg,* 68 C.2d 728, 738, and *Rodriguez v. Bethlehem Steel Corp.,* 12 C.3d 382, 399.

In the case of *Writers Guild of America West v. Federal Communications Commission,* 423 F.Supp. 1064, the Court states at page 1150:

> "When broadcasters deviate from their own independent determinations of what is in the public interest, they violate their FIDUCIARY responsibilities." (Emphasis added)

Here the Federal District Court likewise recognized the fiduciary responsibility of a television network to the general public. Certainly where there is a fiduciary responsibility, there is a legal duty.

After the California Supreme Court in *Weirum* had found under the tort of negligence that there was duty and that the jury properly could find as a question of fact foreseeability this Court then turned to the contention that the First Amendment was an absolute defense.

There is only one paragraph of the entire decision that deals with the applicability of the First Amendment as a defense. That is the second paragraph of the decision that appears on page 48 which reads as follows:

> "Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. (7) The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."

If as Respondents contend *Weirum* is distinguishable because based on incitement which is an exception to the First Amendment, then the California Supreme Court would have stated that normally the First Amendment would have been a defense in the *Weirum* case but because of the exception of incitement, it did not apply.

The Court clearly stated that deference to society's interest in the First Amendment is clearly without merit where the issue of civil accountability for the foreseeable result of a broadcast creates undue risk of harm. The Court's language also is crystal clear that the First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act.

What greater proof of undue risk of harm is there than the very fact that the California Medical Association has joined with appellant and has filed a brief in this case setting forth the severe medical effect on children by this particular broadcast?

Any attempt to distinguish the facts of the *Weirum* case from the facts in the instant case is meaningless in the context of what the California Supreme Court has stated with relation to a First Amendment defense.

If the First Amendment cannot be a defense to the infliction of physical injury achieved by word, then what can be accomplished by attempting to compare the facts of the *Weirum* case with the facts in the instant case?

For the purpose of this argument, Respondents admit that the telecast inflicted physical harm upon the appellant.

The above admission squarely brings it within the language of the Supreme Court which holds that under such circumstances the First Amendment is not a defense.

Whether those words were more provocative or more inciting to action than those in the instant case has nothing to do with the defense of the First Amendment under the guidelines outlined by our Supreme Court.

Once Petitioners admit, as they did, that their words caused physical injury to another, the defense of the First Amendment could not be urged and that ends the matter.

Justice Harlan in the case of *Rosenbloom v. Metro Media,* 403 U.S. 29, states at pages 323 and 324 of the opinion as follows:

> "I think we all agree on certain core purposes, First, as a general matter, the States have a perfectly legitimate interest exercised in a variety of ways in redressing and preventing careless conduct no matter who is responsible for it, that inflicts actual measurable injury upon individual citizens. . . ."

And at pages 325 of said opinion:

> "A business is not immune from paying damages because it happens to be the media. THE MEDIA HAS NO SPECIAL IMMUNITY FROM THE GENERAL LAW OF NEGLIGENCE. THAT

DAMAGE HAS BEEN INFLICTED BY A PICTURE RATHER THAN BY OTHER INSTRUMENTALITIES CANNOT INSULATE IT FROM LIABILITY." (Capitals ours)

"SO LONG AS THE EFFECT OF THE LAW OF NEGLIGENCE IS SIMPLY TO MAKE THE MEDIA PAY FOR HARM THEY HAVE NEGLIGENTLY CAUSED TO THOSE TO WHOM THEY OWE A DUTY, THE FIRST AMENDMENT SHOULD NOT BE A DEFENSE."

"If a network refused to pay its bills because to do so would put it out of business, would the First Amendment dictate that this be treated as a defense?"

"If an automobile carrying a newsman to the scene of a history-making event ran over a pedestrian, should a verdict in favor of the pedestrian be based upon generally applicable tort law principles or must it be assessed against the probability that it would deter broadcasters from news gathering before it could pass muster under the First Amendment?"

"THE USUAL TORT RULE IS THAT ONCE SOME FORESEEABLE INJURY HAS BEEN INFLICTED, THE NEGLIGENT DEFENDANT MUST COMPENSATE FOR ALL DAMAGES HE PROXIMATELY CAUSED IN FACT, NO MATTER HOW PECULIAR THE CIRCUMSTANCES OF THE PARTICULAR PLAINTIFF INVOLVED. (Prosser, *The Law of Torts,* Section 50 [3rd Ed.]."

"IT DOES NO VIOLENCE TO THE VALUE OF FREEDOM OF SPEECH AND PRESS TO

IMPOSE A DUTY OF REASONABLE CARE UPON THOSE WHO WOULD EXERCISE THOSE FREEDOMS." (Capitals ours)

The case of *Zacchini v. Scripps-Howard Pub. Co.,* 45 U.S.L.W. 4954, 4957 (U.S. June 28, 1977), was a case involving a suit to recover for the unauthorized televising of a plaintiff's circus act. The Court held that the First nor the Fourteenth Amendment do not immunize the media when they broadcast a performer actor without his consent. At page 4958, it states:

> "Petitioner does not seek to enjoin broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz.*"

So in the instant case, we do not seek to immunize the media. We merely want to be paid for damages. We do not seek to impose any prior restraint on the media. We merely seek damages for a negligent and reckless act that has already occurred by the improper time, place and method of telecasting the production.

Petitioners have cited the case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 11 L.Ed.2d 686, for the legal proposition that the First Amendment should apply in civil lawsuits between private parties just the same as in criminal actions.

It was never the intention of Your Honorable Court to hold that whenever words cause injuries that the First Amendment is an absolute defense.

The very proof of this fact is that the *New York Times* case involved an Alabama statute which related to the tort of libel.

While it is true that the tort of libel today is no longer based upon strict liability but rather upon the principle of negligence, yet the tort still exists.

The tort of invasion of privacy still exists.

Justice Carter in writing the opinion of the Court in the case of *John W. Gill v. The Curtis Publishing Company,* 38 Cal.2d 277, pointed out that while it is true that the right of privacy does infringe upon the absolute freedom of speech and of the press and it also clashes with the interest of the public in having a free dissemination of news and information yet these constitutional guaranties of freedom and speech and of the press do not warrant the publication of matter constituting an invasion of the right of privacy any more than they give the right to defame a person.

Fraudulent representations of the intentional infliction of emotional distress by language or the wrongful interference of a business contract involve speech and yet in the balancing of interest, the innocent person injured by these torts is entitled to redress.

Years ago this Honorable Court made famous the distinction in freedom of speech cases with the example of one who cries fire in a crowded theater.

The person who cries "fire" in a crowded theater does not tell the people in the theater to block the entries or jostle their fellow patrons or do anything illegal.

The use of the word "fire" instills fear and fear results in causing panic.

In the instant case, psychiatrists will testify that just as the person who yelled "fire" may cause panic, the type of scene that was shown in "Born Innocent" may likewise stimulate injurious acts by minors.

The legal doctrine of "The Attractive Nuisance Cases" came into being based upon the well known principle that with children "monkey see, monkey do".

The tort in the instant case was committed by both words and actions.

The Petitioners did not do any imitating.

By their negligent actions it is alleged that they caused someone other than a party to the action to imitate and thus cause the psychic injury to the minor plaintiff.

As Petitioners admit there was a warning given by Petitioners preceding the showing of "Born Innocent" in that parental discretion was advised because of the nature of the production and that it might be harmful to minors.

This warning could not have protected the Respondent who is the innocent victim as she did not receive her injury by viewing the televised picture.

On the other hand, this warning was an admission by Petitioners that some parents might not want their children to see this degenerate scene because it might have a bad effect on their minds.

Whenever there is a compelling State interest involved then there is a compelling interest of the courts to limit it.

When speech and non-speech elements are combined in the same course of conduct a sufficiently important interest in regulating the non-speech element can justify incidental limitations on the First Amendment freedoms.

The above principles of law were stated in the case of *United States v. O'Brien* (1968) 391 U.S. 367 (20 L.Ed.2d 672, 88 S.Ct. 1673). In this opinion Your Honorable Court stated:

> "This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (See *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817].)

Your Honorable Court in *Bates v. State Bar of Arizona* (..... U.S. pp. ....., ... 53 L.Ed. pp. ....., ..., 97 S.Ct. pp. 2701-2707) holds that the justifications of the restriction of the price advertising by attorneys of routine legal services is permissible. The Court, however, pointed out that even though under the limited facts of this opinion in stating First Amendment rights, a clear tenor of its opinion, including a specific disclaimer of any intent to resolve the problems associated with in-person solicitation, is that it would not accord similar protection to in-person solicitation.

Again, Your Honorable Court in the case of *Bigelow v. Virginia* (1975) 421 U.S. 809 (44 L.Ed.2d 600, 95 S.Ct. 2222) stated in effect that a communication that serves no discernible purpose other than the attraction of clients is outside the scope of First Amendment protection.

Recently in the case of *People v. Kitsis,* 77 C.A.3d Supp. 1 (Cal. Rptr.) decided 12/21/77, the Court held that an attorney could not escape soliciting business otherwise known as "ambulance chasing" by contending that he had freedom of speech under the First Amendment.

The Court held that the First Amendment of the Federal Constitution did not afford an attorney an avenue of escape by claiming that he had the right of free speech.

The Court held that the compelling State interest was protection of its citizens from the probability of fraud, deception and overreaching inherent in the practice of "ambulance chasing".

The compelling State interest involved in this case which requires tort (negligence) liability is the compensation for serious psychological injury proximately caused to a child by the dissemination of a television production during the family hour and by attracting children to watch it by its type of advertising.

Tort liability is the compelling State interest to see that an innocent victim of negligent or willful acts is adequately compensated for the wrongdoing.

II.

EVEN ASSUMING THAT THE FIRST AMENDMENT IS A DEFENSE TO A TORT CAUSED BY WORDS AS WELL AS CONDUCT IT IS NOT AN ABSOLUTE DEFENSE.

A. There is no Louis IV absolutism concerning the First Amendment Defense.

Your Honorable Court many years ago uttered the famous quotation "One cannot yell fire in a crowded theater".

If, during oral argument before this Honorable Court a spectator stood upon his seat and yelled out his political beliefs he would either be immediately rushed out of the chambers by the bailiff or most likely arrested. Could he urge the defense of protection under the First Amendment?

Can one with a truck and loud speaker go through a sleeping neighborhood at 1:00 a.m. proclaiming in loud tones the Bill of Rights?

Can pornographic movies be displayed at a kiddie's matinee in a motion picture theater?

There must always be a balancing of place and time and conditions when the defense of the First Amendment is considered.

Certainly calling out fire in a theater does not constitute fighting words. The result of yelling fire in a crowded theater might lead to a rush by the crowd to the doors thus causing a loss of life and injuries. This is merely injury and proximate cause rather than the test of incitement under the case of *Brandenberg v. Ohio,* 395 U.S. 444.

B. If the trier of fact in the instant case finds negligence there will be no threat to the vigor of journalistic and creative endeavors.

The California Supreme Court's language in *Gill v. Curtis,* 38 Cal.2d 277, which states that if the recognition of the right involves many cases near the border line and presents perplexing questions this is not good ground for denying protection of such rights where it is clearly shown legal wrong has been done, applies here.

In considering the First Amendment defense there is always bound to be a certain clash of interest and the Court must balance the public interest.

The psychiatrists and psychologists and experts in the trial will testify that this particular scene was different than the sword stabbing in Hamlet or the relating of a rape or murder on the 6:00 p.m. news.

How often do we hear that girls insert foreign objects into the vaginas of other girls?

The girls that were portrayed in this scene were modern day girls and in surroundings that were similar and familiar to the children viewers.

The experts will testify that because of this these children could place themselves in the scene and become emotionally involved. Likewise there is the medical likelihood that some of these children would want to attempt to get the thrill out of actually experimenting with this unusual type of act.

These professors and experts have been preaching this message to the broadcasters for years and it has fallen on deaf ears.

This case proves conclusively that the doctors and experts were correct because the children in this case confessed as to their motive in imitating the act and further the very fact that such an unusual and bizarre act was repeated only four days after it was televised is positive proof in itself.

Thus this case must be looked at by itself and on its own facts just as any other negligence case is examined.

If two cars hit at an intersection under certain circumstances, one would not expect the Court to be comparing with what might happen to the impact of different types of cars hitting in different intersections at different times and under different circumstances. There are acts of negligence in this case that would apply to this case and not to others.

In this case, we find commercial companies advising respondents that they will not sponsor "Born Innocent" because of this violent scene.

We will prove that Petitioners put this particular picture on at this particular time for solely commercial reasons in order to meet competition from other networks at this time slot. We will show that the advertisements for this picture were designed to attract children audiences despite the knowledge of the officers of Petitioners that this type of scene should not be shown at this particular hour.

When one is told that at 7:30 p.m. and 8:00 p.m. a five minute scene is presented where one girl simulates jabbing a plumber's helper between the legs of a 15-year-old girl while other children watch and that the scene is so graphic that hundreds of people write letters that they thought they saw penetration it can hardly be believed. It shocks by the mere telling that such an act took place.

How can this compare with an actor placing the point of his sword at the chest of another actor and then the actor pretending to fall dead? Shakespeare contains scenes that suggest adultery and fornication, yet the stark portrayal in textbooks of minors of such acts shown to children would not be acceptable.

As yet, news reporters have found no necessity to plant their cameras in lovers' lane so that they may be on the 6:00 p.m. news to show to the public that fornicating is actually going on in parked cars or even on the 6:00 p.m. news showing actual rapes if they were fortunate enough to have their cameras ready at the time.

Petitioners concede that the First Amendment would not go so far as to permit pornographic movies

to be shown at a Saturday afternoon kiddies' performance even though adults may see them. Why not if there is to be an unlimited defense of the First Amendment?

Perhaps some adults would like to join the audience with the children and watch these pornographic pictures.

We submit that a jury is entitled to hear the medical professors advise them as to their opinion why these minors committed this unusual crime after seeing the scene in "Born Innocent" and give their medical reasons for the same.

Freedom of speech or press does not mean that one can talk or write where, when and how one chooses (see *Beard v. Alexandria*, 341 U.S. 622, 95 L.Ed. 1233).

Your Honorable Court has held that words, pictures and printed matter that come through the mail and harm minor members of the household are not protected (see *Redrup v. New York*, 386 U.S. 767, 18 L.Ed.2d 515).

Respondent contends that a theater can protect children from seeing a pornographic picture or x-rated pictures because they know who comes into a theater and have the power to bar them.

Do Petitioners seriously contend that because they use the public airwaves that belong to the people that they can come into homes and cause harm to minors because they have no control over the homes into which broadcasts enter?

How many children watch television when their parents are not home? Many children have televisions in the bedrooms. Must their parents patrol the room of the child after he closes his door?

The Petitioners justify their position by stating that they put on the screen a warning that this picture may be harmful to the minds of minors.

This very warning is like a red flag in front of a bull to a child. If he was never going to watch the show, he will certainly watch it when this warning appears.

The Petitioners are very careful that they do not affect the minds of adults by commercial ads of lingerie. They would never think of having a live model appear in bra and panty hose because it might invite some man to rape. Thus bras and panty hose float through the air free of any human form.

Petitioners would not permit a glass of beer to touch the lips of the actor or even permit the sight of hard liquor on their screen. Here they do not seem worried about the First Amendment.

C. It has always been the law that every society has a legitimate interest in protecting the health of its children and when this interest clashes with the First Amendment, the protection of the health of the child predominates. (See Vol. 1, Modern Constitutional Law, Antieau, pages 57 and 58 with decisions of the United States Supreme Court within the text.)

Tne following United States Supreme Court opinions held that whenever there is a clash between the United States Constitution damaging the health of

children and freedom of speech, the former must prevail: *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093; *Hughes v. Superior Court of California,* 339 U.S. 460, 94 L.Ed. 985; *Prince v. Massachusetts,* 321 U.S. 158, 88 L.Ed. 645.

In the case of *Akins v. County of Sonoma,* 67 C.2d 185, the Court approved an instruction recognizing the tender and complex character of children and the need to exercise greater care for their protection and safety.

Why did the Petitioners go to the Walt Disney Productions who refused among 15 others to sponsor this production if they did not anticipate through their negligence and recklessness that they would secure a children's audience?

Again, we state emphatically that this case must be viewed narrowly and considered as any other action based upon negligent and reckless conduct would be considered.

There is a different constitutional standard concerning the First Amendment defense when there is a specific aim to direct words or pictures to juveniles as distinguished from adults.

See *First Unitarian Church of Los Angeles v. Los Angeles County,* 311 P.2d 508, which holds the well-known principle of law that there is no absolute right of free speech.

See the case of *Davis v. Macon Telegraph Publishing Co.,* 92 S.E.2d 619, that holds that free press and responsible press should be synonymous.

We respectfully call to the Court's attention those cases which hold that *whenever clear and present danger outweighs the utility of the speech or picture involved, the First Amendment is no longer a defense. Winters v. People of the State of New York,* 330 U.S. 507, at page 510, 92 L.Ed. 840.

The question of what constitutes clear and present danger is always a question of fact. *Danskin v. S. D. Unified School District,* 28 C.2d 536, at page 542; *Bridges v. State of California,* 86 L.Ed. 172; *People v. Garcia,* 37 C.A.2d Supp. 753 at 761; *Roth v. United States,* 354 U.S. 476, 1 L.Ed.2d 1498.

Your Honorable Court has always shown a special regard for juveniles concerning publications by the media. See *Redrup v. New York,* 386 U.S. 767, 18 L.Ed.2d 515, at page 517.

To the same effect, Your Honorable Court states in the case of *Paris Adult Theater v. Slaton,* 413 U.S. 49, 37 L.Ed.2d 446 at page 486:

> "The opinion in *Redrup* and *Stanley v. Georgia* reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interest . . . .
>
> "If children are not possessed of that full capacity for individual choice, which is the presupposition of the First Amendment guarantees, then the state may have a substantial interest in precluding the flow of obscene material, even to consenting juveniles."

The Court has recognized pictures as encouraging or carrying anti-social behavior in juveniles. We call

the Court's attention to the case of *Kaplan v. Caley*, 413 U.S. 115, 37 L.Ed.2d 492, at 497:

> "For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact. (Footnote—Report of the Commission on Obscenity and Pornography 401 [Hill-Link Minority Report]). A state could reasonably regard the 'hard core' conduct described by Suite 69 as capable of encouraging or causing anti-social behavior, especially in its impact on young people."

It is interesting to note that Your Honorable Court here recognizes that the media can produce an anti-social behavior reaction by what it publishes in its import on young people.

This is of particular importance when we observe the language of other United States Supreme Court decisions that are cited in Appellant's Opening Brief that emphasizes *that motion pictures and television have far more impact on their listening audience than does the printed word.*

The concern for young people with regard to the media is again expressed by the Ninth Circuit in the case of *United States v. Pellegrino*, 467 F.2d 41 at page 44:

> "This is not to say that in cases of distribution or exposure to juveniles or of intrusion upon unwilling or unsoliciting adults, the First Amendment protects distribution of all non-obscene materials. *Ginsberg v. New York*, 390 US 629, 20

> L.Ed.2d 195, holds to the contrary that certain non-obscene (under general constitutional standards) material deemed harmful to youth is subject to regulation . . . The point is that in these areas special regulations are necessary to meet these special problems. (*Jacobellis v. Ohio*, 378 US 184, 195, 12 L.Ed.2d 793; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39; Magrath, *The Obscenity Cases; Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 75-76 and n.295.)"

The Court then held that in the instant case there was no evidence that the appellant was attempting to appeal to an audience of minors. The book involved contained explicit color photographs of female genitalia.

It is obvious that photographs of the naked body have never been considered obscenity. *Yet the Ninth Circuit let it be known that if such literature had been distributed and aimed at audiences of juveniles, the standard would be different.*

The case of *Rowan v. Post Office Department*, 25 L.Ed.2d 763, reminds us that television intrudes upon the privacy of the home.

Again Your Honorable Court considers minors different from adults in the case of *Young v. American Mini Theaters*, 49 L.Ed.2d 310, decided in June, 1976.

In this case an ordinance was passed that adult book stores and adult movie houses had to be located more than 500 feet from a residential area.

In considering the constitutionality of such a statute in face of the alleged defense of the First Amendment, Your Honorable Court states at page 321:

> "The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, this commodity is essentially unrestrained."

It might be noted that there is no attempt here to keep the public from viewing violence on children or viewing child pornography but this is merely a case seeking damages because of the negligent time and manner in which these scenes were shown.

The Court continues at page 325:

> "Indeed the members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the state could prohibit the distribution or exhibition of such materials to juveniles. Surely, the First Amendment does not foreclose such a prohibition . . . . Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment."

In the case of *Ginsberg v. United States*, 390 U.S. 629, the facts involved the *sale to a 16-year-old boy of two girly magazines* that can be found on all of our newsstands. This sale was made in violation of an ordinance that made it unlawful to sell that which is obscene to minors rather than what is obscene to adults. The Supreme Court states as follows in the opinion:

> "The 'girly' picture magazines involved in the sales here are not obscene for adults. But 484-h does not bar the Appellant from stocking these magazines and selling them to persons 17 years of age or older and, therefore, the conviction is not invalid . . . . We have recognized that even where it is an invasion of protected freedom 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'. *Prince v. Massachusetts*, 321 US 158, 170, 88 L.Ed. 645, 654 . . . . But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct or will probably induce its recipients to such conduct, *a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous.* Dr. Gaylin of the Columbia University Psychoanalytic Clinic reporting on the views of some psychiatrists in 77 Yale L.J. at 592-593." (Italics ours)

Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419 at 430:

> "This much has been categorically settled by the Court that obscene material is unprotected by the First Amendment."

And at page 431:

> "It is possible, however, to give a few preliminary examples of what a state statute could define for regulations under part (b) of the standard announced in this opinion, supra;—(a) Patently offensive representations or distributions of ultimate sexual acts, normal or perverted, actual or simulated. *In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system.*" (Italics ours)

Thus, Your Honorable Court points out that a state statute under the standard now set forth by the Court, can prevent an offensive perverted sexual act, even if simulated, and certainly if performed on a 12-year-old girl, as was done in the instant case. Again it is interesting to note that in considering such standards, the Supreme Court specifically points out that we must rely on the jury system.

Your Honorable Court continues at page 435:

> "The adversary system with lay jurors as the usual ultimate fact finders in criminal prosecutions has historically permitted the triers of fact to draw on the standards of their community guarded always by limiting instructions on the law."

Another case that points out the difference between the standards for juveniles and the standards for adults is *Quarterman v. Byrd,* 453 F.2d 54 at page 57:

> "Free speech under the First Amendment, though available to juveniles and high school students as well as to adults, is not absolute and the extent of its application may properly take into consider-

> eration the age or maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults, BUT NOT WHEN MADE AVAILABLE TO MINORS. (Footnote—*Prince v. Massachusetts,* 321 U.S. 158, 170; *Ginsberg v. New York,* 390 U.S. 629, 638, *Tinker v. Des Moines School District,* 393 U.S. 503." (Capitals ours)

In the case of *Russo v. Central School District No. 1, Town of Rush, New York,* 469 F.2d 623 (1972), at page 631:

> "CHILDREN IN MANY INSTANCES HAVE MORE LIMITED FIRST AMENDMENT RIGHTS THAN DO ADULTS." (Capitals ours)

The Federal Court again recognized the difference between children and adults when considering a First Amendment defense and states in the case of *Egner v. Texas City Independent School District,* 338 F.Supp. 931 at 944 as follows:

> "School officials are entitled to consider the special characteristics of their charges, such as emotional immaturity. See *Ginsberg v. New York,* 390 U.S. 629, 20 L.Ed.2d 195."

The same holding may be found in the cases of *Sullivan v. Houston Independent School District,* 333 F.Supp. 1149, 1162-1163; 82 Harvard L.Rev. 63, 124-130; *Conners v. Riley,* 395 F.Supp. 1244.

Special legislation concerning censorship as applied to books sold to children was upheld in the case of *People v. Kahan,* 206 N.E.2d 333 at 334:

"REASONABLE RESTRICTIONS MAY BE PLACED ON BOTH THE TIME AND THE PLACE AND THE MANNER OF THE EXERCISE OF FREE SPEECH. *Chambers v. Municipal Court for Oakland, Piedmont Judicial District, Alameda County*, 135 C.Rptr. 95." (Capitals ours)

To the same effect, see *Koppinger v. City of Fairmont*, 248 N.W.2d 708.

It is interesting to note that in the *Chambers* case the Court points out that REASONABLE RESTRICTIONS MAY ALWAYS BE PLACED ON BOTH THE TIME AND THE PLACE AND THE MANNER OF THE EXERCISE OF FREE SPEECH.

This is particularly applicable to the instant case where we claim that the negligence and reckless conduct of Petitioners consisted in the time in which they broadcast the picture and the manner in which they did so and the manner in which they framed their advertisements in order to induce a youthful audience.

The Federal District Court of New York likewise considered the different standards concerning children than adults in the case of *Trachtman v. Anker*, 426 F.Supp. 198 (December, 1976). This case involved the distribution of questionnaires in a school concerning the sexual attitudes of the students. The Court states at page 201:

"First Amendment rights must be applied in the context within which they are asserted . . . what is the potential for psychological harm as a result of the distribution? . . . If defendants can prove

there is a strong possibility the distribution of the questionnaire would result in significant harm to members of Stuyvescent High School, then the distribution could be denied . . . The thrust of defendants' evidence is that serious harm could result if certain students are confronted with particular questions in the survey. The results, defendants claim, is that certain students may become quite apprehensive or even unstable as a result of answering this questionnaire. The Court finds that this reason applies only to students as young as 13 and 14 years of age. Defendants, therefore, did not violate the Constitution in prohibiting distribution at this level."

At page 202:

"FREE SPEECH UNDER THE FIRST AMENDMENT, THOUGH AVAILABLE TO JUVENILES AND HIGH SCHOOL STUDENTS, AS WELL AS TO ADULTS, IS NOT ABSOLUTE, AND THE EXTENSION OF ITS APPLICATION MAY PROPERLY TAKE INTO CONSIDERATION THE AGE OR MATURITY OF THOSE TO WHOM IT IS ADDRESSED. *Quarterman v. Byrd*, 453 Fed.2d 54, 57 (4th Cir. 1971) . . . INFORMATION ABOUT SEX, BOTH CORRECT AND INCORRECT, IS IMPARTED DAILY ON TELEVISION, ON RADIO AND VIA THE RASH OF NEW SEX MAGAZINES ABOUT TOWN. THE COURT FINDS THAT THE SURVEY, AS TO THE OLDER STUDENTS, WOULD OUTWEIGH ANY HARM. THE COURT FINDS THAT THE DOCUMENTS SHOULD NOT BE DISTRIBUTED TO THE 9TH AND 10TH GRADE STUDENTS; THAT SAFEGUARDS

SHOULD BE PROVIDED FOR GRADES 11 AND 12." (Capitals ours)

The Petitioners cite the cases of *Erznoznik v. City of Jacksonville* and *Pacifica Foundation v. FCC* (which relied on *Erznoznik*) for the proposition that dissemination of protected materials may be limited so as not to reach minors only in very limited circumstances. But both cases invalidated speech regulating statutes on grounds of *overbreadth*, claiming that the laws involved in each case could have been drafted more narrowly. This case presents no overbreadth issue because no law, and no direct attempt at regulation by the state, is being challenged; rather the Respondent seeks merely to initiate a cause of action sounding in tort and the Petitioners certainly can level no overbreadth claim against the decisional precedent or statutes sanctioning such an action.

Moreover, *Erznoznik* has since been distinguished by Your Honorable Court. *Young v. American Mini Theaters,* 427 U.S. 50, involved a Michigan ordinance restricting the location of adult theaters. The Petitioners cited *Erznoznik* as a basis for invalidating the ordinance. The Court said:

> "The city council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and becomes a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of 'offensive' speech. In contrast, in *Erznoznik* . . . the justification offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, 'offensive' speech."

Here, the Respondent's tort action is not instituted for the purpose of stifling speech; nowhere does Respondent contend that "Born Innocent" should *never* have been televised at *any* time. Rather, she contends it was negligent to telecast this film in early evening hours. The purpose of her lawsuit, then, is focused upon a "secondary effect" making Petitioners liable for their negligent act. Thus, Respondent's suit fits within the exception engrafted by *Young* upon *Erznoznik*.

The New York Court of Appeals was asked to pass upon the validity of a statute prohibiting the sale of explicit but non-obscene materials to minors. It said:

> The clear implication . . . is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Three years later, in a case involving a challenge to the same law, Your Honorable Supreme Court expressed similar sentiments:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the challenged enactment] simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest . . ." of such minors . . . That the State has power to make that adjustment, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 170 [1943].

The rule of *Ginsberg, supra,* has been reiterated by later decisions. Thus, the same term, in *Interstate Circuit v. Dallas*, 390 U.S. 676, 690 (1968), the Court said: "We have indicated more generally that because of its strong and abiding interest in youth, a state may regulate the dissemination to juveniles of, and their access to, material objectionable as to them but which a State clearly could not regulate as to adults." Similarly, it was noted in *Trachtman v. Anker,* 426 F.Supp. 198, 201 (S.D. N.Y. 1976) that *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) "did not delineate the circumstances under which the school authorities may proscribe students' First Amendment rights. If defendants can prove there is a strong possibility the distribution of the questionnaire [concerning students' sexual attitudes] would result in significant psychological harm to members of Stuyvesant High School, then the distribution could be denied."

Similarly, in *Conners v. Riley*, 395 F.Supp. 1244, 1251 (W.D. Ark. 1975), the Court remarked: "The *Ginsberg* doctrine applies not only in the context of an actual sale of material in question to a minor but is equally viable in the situation where the material is displayed publicly or displayed in an area to which children have access." The Fourth Circuit has adopted a similar stance: "Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute and the extent of its application may properly take into consideration the age of maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults but not when made available to minors. . . ." (*Quarterman v. Byrd*, 453 F.2d 54, 57-58 (4th Cir. 1971)). So has the Ninth Circuit: "This is not to say that in cases of distribution or exposure to juveniles or of intrusion upon unwilling or unsolicited adults the First Amendment protects distribution of all non-obscene materials. *Ginsberg* . . . holds to the contrary that certain non-obscene (under general constitutional standards) material deemed harmful to youth is subject to regulation. The same surely applies to undue intrusion. . . . The point is in these areas special regulation is necessary to meet these special problems." (*United States v. Pellegrino,* 467 F.2d 41, 44-45 (9th Cir. 1972)).

All these rulings sanction direct state control over the dissemination of otherwise protected materials to juveniles. They authorize regulation of both the sales of and the access of such materials. Here, the State is, if at all, regulating indirectly by providing a forum for a tort suit against a broadcaster who televised such an objectionable program. Given the State's interests in protecting minors, this degree of regulation is entirely permissible and well within the parameters of the *Ginsberg* rule. But Petitioners claim broadcasters, who have no control over their audience, ought to be entitled to a special exemption from this rule. They cite one case (*Butler v. Michigan*, 352 U.S. 380 (1957)) decided by the Supreme Court eleven years *before Ginsberg* to support their view; but that case, besides expressing an antiquated view of the problem, dealt with booksellers, not broadcasters. Conversely, the cases cited (on pages 16-17) refer generally to objectionable materials and make no distinction among the disseminators of such materials.

This Honorable Court in the case of *Young v. American Mini Theaters,* 427 U.S. 50, 69-71, did not distinguish among the ways in which such objectionable films could be accepted or the ability to exclude minors from theaters. Written films could be regulated on the basis of content which even protected materials could be withheld from minors. Thus, the *Ginsberg-Young* rationale evinces courts' desire to afford states great leeway in protecting juveniles and that rationale is broad enough to support the prosecution of a tort action in State courts.

Petitioners would attempt to counter this argument by citing cases like *Erznoznik v. Jacksonville,* 422 U.S. 205 (1975) and *Pacifica Foundation v. FCC,* 556 F.2d 9 (D.C. Cir. 1977). Both these cases invalidated either a State law of a Federal regulation restraining certain types of communications; but both did so on grounds of overbreadth, in that the challenged enactments were phrased too loosely to withstand judicial scrutiny. In this case, no overbreadth issue exists. Certainly Petitioners do not claim the judicial precedent or State statutes vesting plaintiff with a cause of action are themselves constitutionally infirm. Instead, Petitioners rely on dicta taken from these cases to support their dubious thesis. But *Young,* too, talked about *Erznoznik.* In *Young,* a challenge was raised to a Detroit ordinance restricting the placement of adult theaters. The Court distinguished *Erznoznik* as follows:

> The [Detroit] City Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of "offensive" speech. In contrast, in *Erznoznik,* supra, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic—an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity (*Young, supra* at 71 n. 34).

Here, the State's provision of a forum to try a tort action is not aimed at stifling speech. The Respondent's claim is that a specific scene in a broadcast film caused her harm, for which she seeks a recovery. The focus of the tort action, then, is not on the curtailment of a type of communication, but rather on ensuring that a specific media defendant pays for the consequences of his negligence. This goal is an example of the "secondary effect" referred to by *Young*. Therefore, Respondent's use of State courts to impose liability on the Petitioners falls within the specific exception engrafted upon *Erznoznik* (and, by extension, *Pacifica Foundation,* which relied on the logic of *Erznoznik*) by *Young*.

D. Assuming that the First Amendment defense applies, it does not mean Respondent should be deprived of a trial. Disputes over constitutional questions and the existence of constitutional facts are no exception to the Seventh Amendment.

Even assuming that in this case there are "constitutional facts" which we strongly dispute, constitutional fact rubric requires de novo appellate review by judges.

Petitioners engaged in a lengthy discussion of "constitutional fact" and the implications in that term that have been explained by various decisions in libel and obscenity cases.

Nowhere, however, do they indicate *what constitutional facts* are at issue in this lawsuit. As defined by *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-286, 11 L.Ed.2d 686 (1964), *the rubric "constitutional*

fact" will be invoked whenever "'. . . a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." In this case, however, it is *never suggested that any intermingling of law and fact* (such as, for example, the concepts of "actual malice" or "public figure" in a libel action) exists with respect to any issue in this lawsuit. Indeed, the Petitioners seem to suggest (p. 16) that the *only constitutional fact involved herein is whether or not "Born Innocent" is actionable.* But that, of course, involves the question of whether the telecasting of that film engendered tortious liability, a question for the jury to decide, and a question which differs significantly from the types of problems referred to by Your Honorable Court in *New York Times, supra.*

Even assuming, however, that this case presents an issue of constitutional fact, Petitioners' analysis of the problems raised by such a designation is specious. They point out, as they must, that whenever a case contains such issues, appellate courts must engage in a de novo review of the facts. This obligation has been summarized well by the Court in *New York Times:* "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . We must 'make an independent examination of the whole record.'" *New York Times, supra,* at 285-86. Accord, *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 54 (1971); *Time, Inc. v. Pape,* 401 U.S. 279, 284 (1971).

From such language the Petitioners derive the principle that whenever a suit is based on a publication, a Court must determine whether or not that publication is constitutionally privileged (p. 15). They claim that the Court of Appeals erred in remanding this case for trial; in fact, the only error is in their misapprehension of relevant precedent.

Although many cases contain dicta to the effect that summary judgments or directed verdicts may be useful in libel suits where media defendants are involved, the following propositions are nevertheless controlling:

1. While *New York Times* announces a standard by which evidence in libel cases will be judged, the manner in which that standard is applied is the same as in all other cases in which it is claimed no issue exists for a jury to decide.

2. Disputes over constitutional fact are no exceptions to the Seventh Amendment.

3. The very fact that a case involves an issue of constitutional fact requires independent de novo review of the trial record by appellate courts; if a summary judgment is granted too hastily, there is no appreciable record available for review and thus such courts are, in effect, precluded from fulfilling their constitutional duties.

4. The key case cited by Petitioners in support of its conclusions about the rule regarding summary procedures in suits involving the First Amendment are (and have been) limited to their facts.

5. Regardless of the presumed need for summary dismissals in libel cases that same necessity does not exist in negligence actions such as this one.

First, Petitioners claim that questions of constitutional fact ought to be decided by judges, not juries. In support of this contention, they cite *Guam Fed'n of Teachers Local 1581, A.F.T. v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), to the effect that a presiding judge in a case involving a media defendant should himself closely scrutinize the evidence in order to determine whether or not a suit should be terminated in the defendant's favor. But this citation is incomplete and is, as a consequence, misleading. The Ninth Circuit went on to state:

> "However, with respect we are not persuaded . . . that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party . . . but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

> The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." (*Guam Fed'n of Teachers, Local 1581, A.F.T. v. Ysrael,* 492 F.2d 438, 441 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974)).

In accord with the above citation we respectfully call the Court's attention to *Alioto v. Cowles Communication,* 519 F.2d 438, pp. 441-443 (9th Cir. 1975). Thus, under *Ysrael,* the *scope of a judge's scrutiny in response to a request for a summary dismissal is very limited;* indeed, the decision indicates no *special procedures exist in suits against media defendants,* at least on this point. Later rulings of the Seventh and Ninth Circuits concur with this view. *Carson v. Allied News Co.,* 529 F.2d 206, 213 (7th Cir. 1976); *Virgil v. Time, Inc.,* 527 F.2d 1122, 1130-31 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976); *Alioto v. Cowles Communications, Inc.,* 519 F.2d 777, 780 (9th Cir. 1975), *cert. denied,* 423 U.S. 930 (1976). The Court in *Virgil* said at 1130:

> We cannot agree that the First Amendment requires that the question [of whether or not a given publication concerns a matter of public interest] must be confined to one of law to be decided by the judge. Courts have not yet gone so far in other areas of the law involving First Amendment problems . . . The testing of facts against a standard founded on community mores does entail judgment of the court itself. *But if*

> *there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function. The function of the court is to ascertain whether a jury question is presented.*

All these cases indicate that merely *because a suit involves First Amendment issues, the usual procedures governing the granting or denial of a summary judgment are not thereby displaced.* The judge in such cases is not licensed to view the evidence in any fashion when a media defendant seeks dismissal of a complaint, but must conform to the *usual practice and give the benefit of his doubts to the plaintiff.*

Second, a *plaintiff who sues a media defendant is also entitled to trial by jury as guaranteeed by the Seventh Amendment.* If summary procedures are too liberally relied upon in such cases, that entitlement is unjustly abrogated. Several Federal courts have emphasized this point. In *Hotchner v. Castillo-Puche,* 404 F.Supp. 1041, 1050 (S.D.N.Y. 1975), *rev'd on other grounds,* 551 F.2d 910 (2d Cir. 1977), it was said: "Although summary judgment in a defamation action might serve the prophylactic function of sparing authors and publishers the chilling effect of litigation, '[t]his procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a person's right to present his case to the jury.'" Similarly, in *Taggert v. Wadleigh-Maurice, Ltd.,* 489 F.2d 434, 439 (3rd Cir. 1973), *cert. denied,* 417 U.S. 937 (1974):

> Article III, section 2 of the Constitution gave the Supreme Court appellate jurisdiction "both as to law and fact." This clause produced an adverse public reaction which resulted in the Seventh Amendment preserving the right to trial by jury in civil cases and providing further that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Disputes over "constitutional fact" are no exception to the seventh amendment. . . . just as disputed facts in a nonjury case are determined by trial and not on summary judgment motion, a trial judge's decision to instruct the jury with the *New York Times* standard or an appellate court's de novo review of "constitutional fact" are both made after a full trial on the contested factual issues.

The plaintiff here asks only for the same consideration.

Third, as noted earlier, when *constitutional fact issues exist in a case, appellate courts must engage in an independent de novo review.*

An *appellate court,* of course, can only review a trial record. If, however, summary judgment is granted too quickly, this precludes the compilation of any trial record capable of being reviewed meaningfully. As a result, a court of appeal is denied any opportunity to fulfill its constitutional obligation. This point has been aptly summarized by the Third Circuit in *Taggert* at page 438, wherein it said that a ruling on constitutional privilege in the context of an invasion of privacy claim

> . . . should be made on a record in which the facts have been fully developed. Only with such a record can the necessary balance between the conflicting rights of personal privacy and of freedom of expression properly be struck. We realize that requiring the defendants to defend in a trial rather than to obtain summary judgment puts them to additional expense, and arguably subjects their First Amendment rights . . . to that much extra "chill." In the context of the problem . . . this degree of "chill" seems to us *de minimis* when compared with the unsatisfactory alternatime of ruling on a potentially serious conflict between legally protected rights without a complete record.

Accord, *Gordon v. Random House, Inc.,* 486 F.2d 1356, 1360-61 (3d Cir. 1973), *vacated on other grounds,* 419 U.S. 812 (1974).

The above cited case holds that summary judgments should never be granted with resolve by the Court where the issue of a constitutional fact precludes compellation.

E. Films and television are not entitled to the same constitutional protections afforded newspapers or other written publications.

Your Honorable Court in the case of *Times Film Corporation v. Chicago,* 361 U.S. 43 at p. 49 in referring to motion pictures states:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process. . . .

> But this position as we have seen, is founded upon the absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases."

Similarly, in the case of *Southwestern Promotional Limited v. Conrad,* 420 U.S. 546, 557 (1975) the Court warned:

> "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."

This cautionary stance had been evinced sixteen years earlier, in *Kingsley Pictures Corp. v. Regents of New York,* 360 U.S. 684, 689-90 (1959), wherein the Court stated: "Nor need we here determine whether, *despite problems peculiar to motion pictures,* the *controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for news, books, or individual speech."*

All these cases stand for the proposition that because visual representations differ so significantly from the written word, such representations are subject to distinctive constitutional protections.

Nowhere is this point made clearer than in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). That litigation involved a challenge to a provision of New York's education code forbidding the commercial showing of films without the approval of a state censor and allowing that official to withhold his approval on the grounds that a film is sacrilegious. At page 502, the Court said:

> It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. *If there be capacity for evil, it may be relevant in determining the permissible scope of community control* but it does not authorize the unbridled censorship such as we have here.

Unlike *Burstyn,* this case presents no "unbridled censorship". Respondent does not allege "Born Innocent" should never have been shown at any time; nor does she advocate the creation of a censor from whom the networks must seek permission before they telecast a program. Instead, the Respondent merely seeks to impose liability for negligence; the state's granting of such a cause of action is surely within the "permissible scope of community control" to which the Court referred. On pages 502-03, the Court declared:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. . . . Nor does it follow that motion pictures are necessarily subject to precise rules governing any other particular method of ex-

> pression. Each method tends to present its own peculiar problems.

Here, too, Respondent asks only for damages that result from the Petitioners' failure to telecast an explicit film at a reasonable time. Certainly, her expectation that the Petitioners would observe reasonable restraints in its televising falls well within the ambit of the limits referred to by *Burstyn*. Moreover, the Court went on to say at page 503:

> The statute involved here does not seek to punish as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon Freedom of expression to be especially condemned.

Unlike Burstyn, this case involves no prior restraint. The Respondent seeks to impose liability *after the fact* for specified conduct. *Burstyn* notes this distinction and indicates that punishment for prior conduct is constitutionally acceptable. The same should be true in the case of the imposition of tortious liability for such conduct. Thus, *Burstyn* and all these cases establish the fact that the First Amendment provides no absolute privilege for filmmakers, but rather affords a degree of protection narrowly circumscribed by the state's ability to exact reasonable restrictions on the time, place and manner in which a motion picture may be exhibited.

Courts have expressed similar limitations with respect to television. In 1969, in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-87 (1969), Your Honorable Court noted "Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Four years later, the Court explained in its holding this case as follows:

> *". . . Red Lion . . . makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation.* Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television and radio cannot be satisfactorily accommodated. The court spoke to this reality when, in Red Lion, we said *'It is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.'"* (*Columbia Broadcasting Sys. v. Democratic Comm.,* 412 U.S. 94, 101 (1973)).

Lower Federal courts have expressed similar views. Thus, in *National Lampoon, Inc. v. American Broadcasting Co.,* 376 F.Supp. 733, 740 n. 2 (S.D.N.Y. 1974), it was said: *"It has generally been recognized that the freedom of expression, and indeed the First*

Amendment rights of licensed broadcasters, are subject to more limitations than publishers, and performers on the stage." Similarly, in *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 477 (2d Cir. 1971), the Court warned "However, the extent of permissible regulation under the First Amendment is not identical for all means of communication. *The peculiar character of the broadcast media requires the application of constitutional standards to their regulation which differ from those applicable to other types of communication.*" The point was best expressed in *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969):

> The First Amendment is unmistakably hostile to governmental controls over the contents of the press, but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets. Moreover, the broadcasting medium may be different in kind from publishing. . . . *Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary*

> *habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some such other affirmative act. It is difficult to calculate the subliminal impact of these pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.*

All these cases conclude that the First Amendment does not absolutely shield broadcasters from regulation by the state. Each of these suits involved direct control exercised by the FCC and, in each case, the controls imposed were upheld as constitutionally permissible. Here, the state is regulating, if at all, only indirectly, by providing the forum for a tort suit against a broadcaster. If Federal courts are amenable to allowing *direct governmental interference* with broadcasting policies, surely the principles announced in such cases should support the kind of indirect "interference" at issue in this case. Any suggestion that the First Amendment exempts negligent telecasts from liability simply ignores the fact that the First Amendment protections accorded broadcasters are not coextensive with those granted other types of media defendants.

F. Even protected speech is subject to a balancing test.

Even if "Born Innocent" were determined to be protected speech that would not foreclose further judicial inquiry. A number of courts have pointed out, in the context of cases involving the media, that even protected speech is subject to a balancing test

in order to determine whether or not it is thoroughly immune from regulation in the public interest.

To this effect, see *Buckley v. American Fed. of Television & Radio Artists,* 496 F.2d 305, at p. 311 where the Court states as follows:

> "Acts of speech and of expression, although protected by the First Amendment are not so exalted that they can never be, even indirectly, obstructed. *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Indeed, even with reference to freedom of the press, the Supreme Court has recently reaffirmed what has long been understood to be the law: '[O]therwise valid laws serving substantial public interest may be enforced against the press as against others, despite the possible burden that may be imposed.' *Branzburg v. Hayes,* 408 U.S. 665, 682-683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). More specifically, where there is a proper governmental purpose for imposing a restraint and where the restraint is imposed so as not to 'unwarrantedly abridge' acts normally comprehended within the First Amendment, there is no abridgment of First Amendment rights." *Cox v. New Hampshire, supra,* at 574.

The Court is respectfully directed to the case of *Banzhaf v. FCC, supra,* at page 1102 concerning this question of balancing of interest.

The case of *Writers Guild of America West, Inc. v. FCC,* 423 F.Supp. 1064, 1134-35, 1140, 1154 (C.D. Cal. 1976) holds that the First Amendment is not violated by self-regulations of the time and place of televising a program. Here again, the Court is point-

ing out that television stations have a duty to the public and must recognize times and places where certain telecast matter is proper and that such self-regulation does not violate the First Amendment.

That is the exact contention used by Respondent in this case and that because Petitioners who had a duty to the public negligently and with recklessness failed to self-control themselves, a child was seriously injured and for this tortious act on their part they must pay damages. As stated by the Court, this has nothing to do with the First Amendment.

In the case of *Interstate Circuit v. Dallas,* 390 U.S. 676, 690 (1968) the Court states:

> "We have indicated more generally that because of its strong and abiding interest in youth, a state may regulate the dissemination to juveniles of, and their access to, material objectionable as to them but which a state clearly could not regulate as to adults."

In *Conners v. Riley,* 395 F.Supp. 1244, 1251 the Court states:

> "The *Ginsberg* doctrine applies not only in the context of an actual sale of material in question to a minor but is equally viable in the situation where the material is either displayed publicly or displayed in an area to which children have access."

In *Young v. American Mini Theaters,* 44 U.S.L.W. at 5005, it states that the context of material is different involving children than adults. Thus, con-

text may be considered in addition to time and place if the First Amendment is conceded to be a defense.

In *Buckley v. American Fed. of Television & Radio Artists,* 496 F.2d 305, 311 (2d Cir. 1974), it was said:

> Acts of speech and of expression, although protected by the First Amendment, are not so exalted that they can never be even indirectly obstructed. *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Indeed, even with reference to freedom of the press, the Supreme Court has recently reaffirmed what has long been understood to be the law: "[O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes,* 408 U.S. 665, 682-683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). More specifically, where there is a proper governmental interest for imposing a restraint and where the restraint is imposed so as to not "unwarrantedly abridge" acts normally comprehended within the First Amendment, there is no abridgment of First Amendment rights. *Cox v. New Hampshire, supra* at 574.

An illuminating example of such balancing is provided by *Zacchini v. Scripps-Howard Pub. Co.,* 45 U.S.L.W. 4954 (U.S. June 28, 1977). That litigation involved a tort action to recover for the unauthorized televising of the plaintiff's circus act. The Court admitted that entertainment enjoyed First Amendment protection in general, but said at page 4957:

> It is evident, and there is no claim here to the contrary that Petitioner's state-law right of publicity would not serve to prevent Respondent from reporting newsworthy facts about the Petitioner's act. Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.

At page 4958, the Court noted:

> "*Petitioner does not seek to enjoin broadcast of his performance; he simply wants to be paid for it.* Nor do we think that a state-law damages remedy against Respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz* [*v. Robert Welch, Inc.,* 418 U.S. 323 (1974)]."

In *Zacchini, supra,* the Court never did decide whether the speech in question was or was not unprotected. It merely held that, upon balancing the interests of the media vis-a-vis those of Petitioner, one could not say that the First Amendment immunized the former from liability. The Court went on to point out that *Gertz* did not bar tort actions against the media premised upon some underlying theory of fault. The principles of *Zacchini* apply in this case. Here, too, Respondent is not alleging liability without fault. She claims that a specific act of negligence on the part of the Petitioners proximately caused harm to her. Nor is the social utility inherent in televising "Born Innocent" at 8 p.m. (rather than 9 p.m. or 10 p.m.) so great as to pre-

clude a state-law damages remedy against the Petitioners. Therefore, under the balancing test as stated in *Buckley* and as applied in *Zacchini,* it can be seen that the interests of the Petitioners simply do not outweigh those of the Respondent, even assuming that the speech involved in this case is protected.

Assuming that imposition of liability in this case would lead to self-censorship such a result would not be unconstitutional.

This conclusion is borne out by language appearing in the case of *Writers Guild of America West, Inc. v. FCC,* 423 F.Supp. 1064 (C.D. Cal. 1976), which dealt, inter alia, with the constitutionality of the family viewing hour. In that case, the Court repeatedly held that it was "constitutional (even assuming state action) for the networks in the capacity as station owners (i.e., licensees) to adopt a family viewing policy and independently apply it . . ." (*Id.* at 1134). Thus, the Court claimed: "The question of what the needs of the community are at particular times is peculiarly the province of the licensee. If the licensee should determine that an audience is likely to be composed of children and adults at particular hours, nothing in the First Amendment prohibits it from programming accordingly." (*Id.*) At page 1135, the Court went on to say: "Those excluded from the airwaves call this censorship. Those permitted to participate call it visionary editorial decisionmaking. But such decisions are inherent to the broadcasting function and constitutionally protected whether or not state action is present. Therefore independent adoption of and application of a family viewing policy by a licensee does not violate the First Amendment."

Here, Respondent does not ask for state regulation of network telecasting policies; she merely wants to recover for harm caused to her by Petitioners' negligence.

Even assuming such an award will cause networks to televise certain programs at later hours, this unilateral decision is, according to *Writers Guild,* not a violation of the First Amendment.

Thus, the regulatory policy which Petitioners claim will be compelled by recognition of a damage remedy here is itself constitutionally permissible because it entails no more than *self*-regulation. Consequently, Respondent perceives no harm in allowing her to press a lawsuit where an alleged indirect effect of that lawsuit will, at best, yield a course of conduct affirmatively sanctioned by the First Amendment.

CONCLUSION

We respectfully submit that the First Amendment is not a defense to a negligence action.

Respondent's action does not call upon the Court for any prior restraint or for any repression or censorship involving broadcasting.

Even conceding for the purpose of argument only that the First Amendment applies, for the reasons above stated, a writ of certiorari would not be proper at this time.

Dated, April 3, 1978.

Respectfully submitted,
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